Filed 11/10/09 P. v. Jones CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RODNEY JAMMAL JONES, Defendant and Appellant.	D053594 (Super. Ct. No. SDC210129)

APPEAL from a judgment of the Superior Court of San Diego County, Cynthia Bashant, Judge. Affirmed.

A jury found Rodney Jammal Jones not guilty of possession of cocaine base for the purpose of sale. Jones was convicted of the lesser offense of possession of cocaine base. (Health & Saf. Code, § 11350, subd. (a).) Additionally, Jones was found guilty of transporting cocaine base. (Health & Saf. Code, § 11352, subd. (a).) Jones was sentenced to three years' probation and was ordered to serve 90 days in county jail.

Jones appeals, contending the lower court erred when it denied his Penal Code section 1538.5[1] motion to suppress evidence because the police lacked consent to conduct a patdown search that resulted in discovery of the cocaine base that was the basis of his conviction. Jones also contends that his trial counsel provided ineffective assistance of counsel by failing to renew at trial the motion to suppress that was only made at the preliminary hearing, thus precluding reconsideration of the motion at trial and on appeal. We conclude Jones's failure to renew his section 1538.5 motion precludes appellate review. However, because it is necessary to determine the legality of the search in order to determine whether counsel was constitutionally ineffective, we shall address the merits of the court's denial of Jones's motion to suppress. We conclude trial counsel was not constitutionally ineffective for failing to renew the motion in at trial because the judge properly denied the section 1538.5 motion to suppress at the preliminary hearing.

FACTUAL BACKGROUND

San Diego Police Officers Michael Usrey and Nestor Hernandez were on patrol in the City Heights neighborhood of San Diego. Officer Hernandez pulled the patrol car up to Jones and slowed down. Officer Usrey spoke to Jones from the car and asked if he could talk to Jones. Jones turned and replied, "What's up?" Jones was doing nothing suspicious, and there was no one walking with him or who appeared to be working with him. After obtaining personal indentifying information from Jones, Officer Hernandez conducted a records check to determine if he had any outstanding warrants. Officer

---

1 Statutory references are to the Penal Code unless otherwise specified.

Usrey asked Jones if he was carrying anything illegal, and Jones replied that he was not. (RT 9-10, 33, 35.) Officer Usrey then asked Jones if he could "check." Jones turned around and put his arms in the air. Officer Usrey interpreted this to be compliance with his request to search. He found a plastic baggie in Jones's right front pocket containing 2.19 grams of rock cocaine.

DISCUSSION

A. *Background on the Motion To Suppress Hearing*

Jones filed a section 1538.5 motion to suppress evidence at the preliminary hearing and moved to suppress all tangible and intangible evidence seized in connection with the patdown search performed by Officer Usrey. He contended the search was illegal because it was performed without a warrant and the People could not show constitutional justification for the search. The People asserted Jones consented to the search when he turned around from the officers and put his hands in the air.

Officer Usrey testified at the preliminary hearing in support of the People's opposition. He testified that Officer Hernandez pulled the patrol car up to Jones and Officer Usrey asked if he could speak with Jones through the patrol car window. Jones responded, "What's up?" Officer Usrey got out of the car and began to question Jones. The officers requested Jones's identification and performed a warrants check. Officer Usrey testified that when he requested the search "there was no response," but Jones turned away and raised his hand up in the air above his shoulders in a "surrender" or "search" position.

At the preliminary hearing, Jones argued that he was doing nothing suspicious when the officers pulled up in the patrol car and that a reasonable person would not feel free to leave. Additionally, Jones argued that the encounter became a detention because Officer Usrey requested identification, performed a warrants check, and asked increasingly accusatory questions over the course of the 10 minutes. The People contended Jones consented to the search when he turned away from the officers and put his hands in the air. The magistrate denied the section 1538.5 motion based on the evidence, and appellant was held to answer. The motion was not renewed in the superior court, and the case proceeded to trial. Appellant was found guilty of possession and transportation of cocaine base.

B. *Failure To Renew Motion*

A defendant may seek appellate review of the validity of a search or seizure following a conviction. (§ 1538.5, subd. (m).) However, to obtain such review, the defendant must "at some stage of the proceedings prior to conviction [have] moved for the return of property or the suppression of the evidence." (*Ibid*.) It is well settled that although a motion to suppress may be made at the preliminary hearing (*id*., subd. (f)(1)), the phrase "at some stage of the proceedings" in subdivision (m) means the proceedings in the superior court. (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896-897.) Thus, even though a defendant charged with a felony moved to suppress evidence at the preliminary hearing stage, to preserve the issue for appeal the defendant still must raise the validity of the search before the trial court. (*Ibid*.) As the court reasoned in *Lilienthal*, "it would be wholly inappropriate to reverse a superior court's judgment for error it did not commit

and that was never called to its attention." (*Id*. at p. 896, fn. omitted; see also *Ramis v. Superior Court* (1977) 74 Cal.App.3d 325, 332 [generally litigant is "not permitted to bypass a remedy in a lower court and reserve his grievance for submission to a higher court"; thus an appeal "brings before the appellate court for review only those matters which were before the lower court when it made its decision"].) By failing to raise the issue of the validity of the search at the trial court level by either pretrial motion or objection at trial, Jones failed to preserve the issue for appeal. (*People v. Miranda* (1987) 44 Cal.3d 57, 80-81; § 1538.5, subd. (m).)

However, because it is necessary to determine the legality of the search in order to determine whether counsel was constitutionally ineffective, we necessarily must address whether the court erred in denying the motion to suppress. (*People v. Hart* (1999) 74 Cal.App.4th 479, 486.) If the search was invalid, failing to preserve the issue constituted deficient performance when measured against the standard of a reasonably competent attorney. (*Strickland v. Washington* (1984) 466 U.S. 668, 686.)

C. *Section 1538.5 Motion To Suppress*

Jones contends that the trial court erred in denying his section 1538.5 motion to suppress evidence because Jones did not consent to the patdown search. This contention is unavailing.

1. *Standard of review*

Our review of the trial court's implied finding that the defendant voluntarily consented to the search is limited. "The powers to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial

court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings—whether express or implied—must be upheld if supported by substantial evidence." (*People v. Superior Court of Marin County* (1975) 13 Cal.3d 406, 410.) Although we defer to the trial court's express and implied factual findings if supported by substantial evidence, we exercise our independent judgment in determining the legality of a search on the facts so found. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301.) Accordingly, we examine the facts most favorably to the ruling, but independently assess whether, as a matter of law on the facts found, the challenged search or seizure conforms to constitutional standards of reasonableness. (*People v. Hughes* (2002) 27 Cal.4th 287, 327.)

2. *Analysis*

No constitutional right is violated when a person freely consents to a search. (*People v. Michael* (1955) 45 Cal.2d 751, 753.) "Whether a particular consent is voluntary depends on the totality of the circumstances; no single factor is dispositive of this factually intensive inquiry." (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1578.)

Nothing in the federal Constitution prevents a police officer " 'from addressing questions to anyone on the streets . . . .' " (*U.S. v. Mendenhall* (1980) 446 U.S. 544, 553.) Like every citizen, police officers are free to question people, who are free to ignore the interrogator and walk away. (*Ibid.*) Here, substantial evidence supports a finding that the encounter between Jones and the officers was consensual. The officers did not use words, gestures, or other coercive conduct to detain Jones, and the evidence suggests he was at all times free to disregard the officer's questions and walk away.

Consent to search may be nonverbal and implied by conduct, although it may not be implied merely from a person's failure to object to the search. (*People v. Harrington* (1970) 2 Cal.3d 991, 995.) When Officer Usrey asked Jones if he could talk to him, Jones agreed. Officer Usrey then got out of the patrol vehicle and asked him some questions. Jones told him he had been discharged from parole and that he was not carrying anything illegal. When Officer Usrey asked if he could check, Jones turned around and put both his hands over his head, which could be reasonably construed as consent to search.

Jones relies on an Illinois Supreme Court decision which did not find implied consent where the nonverbal conduct was "assuming the position" after an officer requested consent to search. (*People v. Anthony* (2001) 198 Ill.2d 194 [761 N.E.2d 1188, 1190].) In *Anthony*, a police officer approached the defendant in an alley after shouting at him from over 50 feet away. The officer asked the defendant what he was doing in the area and whether he had anything on him that could hurt the officer or his partner and requested his consent to a search of his person. The defendant gave no verbal consent but "assumed the position" for a patdown search by spreading his legs apart and placing his hands on top of his head. (*Ibid.*)

The court stated that "[t]he defendant may convey consent to search by nonverbal conduct [citations], but 'mere acquiescence to apparent authority is not necessarily consent' [citation]. . . . [¶] . . . [¶] The State would have us draw an inference . . . that the defendant intended to consent, not acquiesce. An equally valid inference from the defendant's ambiguous gesture is that he submitted and surrendered to what he viewed as

the intimidating presence of an armed and uniformed police officer who had just asked a series of subtly and increasingly accusatory questions." (*People v. Anthony*, *supra*, 761 N.E.2d at pp. 1192-1193, quoting *People v. Kelly* (1979) 76 Ill.App.3d 80 [394 N.E.2d 739, 744].)

The officers in *Anthony* were 50 feet away from the defendant when they initiated the police encounter and immediately asked increasingly accusatory questions regarding his presence in the area and whether he had anything on him that could hurt the officers. By contrast, Officers Usrey and Hernandez did not shout at Jones from a far distance; rather, they were next to him in a marked police vehicle while he was walking down the street. Officer Usrey asked Jones if there was anything new going on in the neighborhood and if he was on parole. The officers did not display or use weapons or otherwise make any show of force. They did not shine a police vehicle spotlight or other light on him and did not command him to do anything. The record does not suggest the officers spoke to Jones in a forceful or hostile manner. Although the encounter involved two officers who were in uniform, this factor is insignificant under the totality of the circumstances.

In *U.S. v. Drayton* (2002) 536 U.S. 194, 204, the Supreme Court found voluntary consent when police officers boarded a bus and requested consent to search persons and luggage. The high court noted that "[t]here was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice." In *Drayton*, an officer asked, "Mind if I check you?" to obtain consent to search Drayton. Drayton gave

no verbal response, but lifted his hands about eight inches from his legs. (*Id.* at p. 199.) The officer conducted a patdown of Drayton's thighs and detected hard objects similar to those found on his traveling companion. He arrested Drayton and escorted him from the bus. (*Ibid*.) The high court concluded these actions were an implied consent to search. Similarly, in this case Jones consented to the police search when he turned around and put his hands on his head. We conclude that Jones's consent to the search was voluntary, and the trial court properly denied the motion to suppress.

D. *Ineffective Assistance of Counsel Claims*

Jones contends counsel provided ineffective assistance when, after his section 1538.5 motion was denied at the preliminary hearing, counsel failed to renew that motion at trial. Jones argues he was prejudiced because the motion had merit and the failure to renew it precluded consideration of the matter by the trial court and by this court. This contention is unavailing.

To establish a prima facie case of ineffective assistance of counsel, Jones must show (1) counsel "performed at a level below an objective standard of reasonableness under prevailing professional norms", and (2) the defense was subjected to prejudice flowing from the deficient performance of counsel. (*People v. Hamilton* (1988) 45 Cal.3d 351, 377.) Since failure of either prong is fatal to establishing ineffective assistance of counsel, we need not address both prongs if we find Jones cannot prevail on one of them. (*People v. Cox* (1991) 53 Cal.3d 618, 656.)

Because we have determined the search was legal, Jones cannot show prejudice when counsel failed to renew the motion to suppress at the trial. Therefore, counsel was not constitutionally ineffective for failing to preserve the issue for review.

DISPOSITION

Judgment is affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.